

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1172

UNITED STATES COURT OF APPEALS
For the Second Circuit

IN THE MATTER OF TESTIMONY BEFORE
AND DOCUMENTS SUBPOENAED BY THE
MAY 1976 ADDITIONAL GRAND JURY

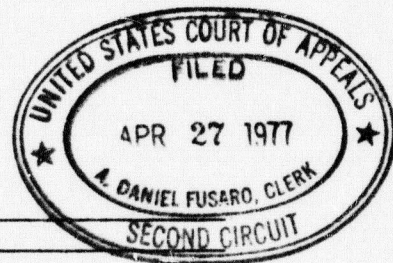
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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR APPELLANTS

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(1975) 13

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

IN THE MATTER OF TESTIMONY BEFORE :
AND DOCUMENTS SUBPOENAED BY THE :
MAY 1976 ADDITIONAL GRAND JURY : Docket No. 77-1172

-----X

Jurisdiction

The court has jurisdiction over this appeal pursuant to Title 28 United States Code Section 1291.

Issue Presented

Did the District Court abuse its discretion in granting an order dated March 11, 1977 permitting the government, nunc pro tunc to May 25, 1976, to disclose to two specific agents of the Internal Revenue Service and one specific agent of the Department of Health, Education and Welfare all of the evidence taken and to be taken by the May, 1976 Additional Grand Jury without conducting an evidentiary hearing on the degree to which the government had already concededly made unauthorized and widespread disclosure of evidence already obtained by the grand jury?

Preliminary Statement

This is an appeal by Robert Beck and Jacob Freedman from an order dated March 11, 1977 issued by Hon. Inzer B. Wyatt, United States District Judge for the Southern District of New York pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure authorizing the Office of the United

States Attorney for the Southern District of New York to disclose to three specific federal agents, not employed by the Department of Justice, all documents subpoenaed and the transcripts of testimony taken before a grand jury which has been conducting some 20 to 25 separate investigations into possible fraud in the Medicare and Medicaid programs. (H. Tr. I(9))*

Relevant Facts and Proceedings Below

On March 2, 1977 appellants Robert Beck and Jacob Freedman moved by order to show cause to quash two grand jury subpoenas duces tecum and to suppress other evidence previously obtained by the use of grand jury subpoenas. In support of the motion to suppress, appellants, even without the assistance of an evidentiary hearing or any discovery process, were able to marshal substantial facts demonstrating an apparently flagrant violation of Rule 6(e) F.R.Cr.P.

As part of an investigation into abuses into the Medicaid program, the United States Attorney for the Southern District of New York commenced an investigation into certain medical laboratories. One laboratory, Kelly Street Medical

*References in the form H. Tr. I() are to pages of the transcript of the argument held before Judge Wyatt on March 11, 1977 (Appendix C). References in the form H. Tr. II() are to pages of the transcript of the argument held before Judge Wyatt on March 21, 1977 (Appendix D).

Laboratory, Inc., became a principal target of the United States Attorney's investigation. On May 25, 1976, a grand jury subpoena duces tecum was issued to Manalin Realty calling for certain books and records. Manalin Realty was the real estate partnership which, inter alia, owned the building in which Kelly Street Lab was located. Appellants Robert Leck and Jacob Freedman are partners of Manalin. The subpoena stated that the investigation was being conducted into alleged violations of Title 18, United States Code, Sections 286, 371, 1001, 1341; and Title 26, United States Code, Sections 7201 and 7206. On the face of the subpoena it was stated:

"Personal appearance may not be necessary if subpoenaed material is delivered prior to return date."

Questions concerning the subpoena were to be directed to Mr. Hartwig, an agent of the Department of Health, Education and Welfare. The subpoena was complied with.

Thereafter, Leon Sunfist and James Lampasso, the two principals of Kelly Street Laboratory, were indicted. Sunfist was indicted in two separate indictments for Medicaid fraud and wilfully subscribing to a false corporation income tax return for Kelly Street Medical Laboratory, Inc. Lampasso was named as a co-defendant in the income tax indictment. Neither Beck nor Freedman was named in either indictment as a defendant or co-conspirator.

On February 7, 1977 a second subpoena was issued to Manalin Realty calling for certain books and records,

some of which had previously been furnished pursuant to the prior subpoena. This subpoena stated that the investigation was looking into alleged violations of Title 26, United States Code, Section 7201 and 7206, sections of the Internal Revenue Code. A similar subpoena was issued the same day to Prospect Hospital, a proprietary hospital located adjacent to Kelly Street Medical Laboratories in which appellants Beck and Freedman also have an ownership interest. No mention was made in either subpoena of alleged violations of any statute other than the Internal Revenue Code. Nevertheless, all questions concerning the subpoenas were to be discussed with Mr. Katz, an agent of the Department of Health, Education and Welfare. All of defense counsel's discussions concerning the timing of the delivery of the records were conducted with Mr. Katz, as again directed by the subpoena. When a problem arose concerning the delivery of certain 1975 financial records of Prospect Hospital, Mr. Katz conferred with the Internal Revenue Service agents concerning the postponement of the delivery of the 1975 records. Conversations with Mr. Katz indicated that in addition to Special Agents of the Intelligence Division of the Internal Revenue Service, Revenue Agents (whose work is basically that of determining civil tax liabilities) had also been working on the case. These subpoenas were complied with with modifications agreed upon with Mr. Katz.

On February 16 and February 22, 1977 two additional

subpoenas were issued to Manalin Realty. These two subpoenas were quashed by Judge Wyatt pursuant to appellants' motion. Again, the only alleged violations of law being investigated as indicated on the face of the subpoenas were violations of Title 26, United States Code, Sections 7201 and 7206. Again, all questions concerning the subpoenas were to be referred to Mr. Katz of Health, Education and Welfare.

Based on conversations between defense counsel and Mr. Katz and with Internal Revenue Service Special Agent Robert Hoffman, it appeared that the government had not previously obtained an order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure authorizing the disclosure of grand jury evidence to these or other agents.

Only when confronted with the motion to suppress did the government ask the court to grant a motion authorizing disclosure. When it did so, it belittled the need for the order and disparaged appellants' efforts to vindicate their right to have grand jury proceedings conduct in conformity with Rule 6(e):

"You have a proposed order, the Rule 6(e) order which I have referred to in my affidavit, and I think your Honor can deal with that at a later time at your leisure. I am not suggesting that its necessary, but I think its probably good insurance against further motions of this type."

H. Tr. 1 (8).

Judge Wyatt was taken aback by the scope of the government's proposed disclosure order. (See Appendix B.)

"THE COURT: You told me there are twenty-five from each agency, and you are making them, in effect, Assistant United States Attorneys."

H. Tr. 1 (10).

"THE COURT: Apparently you are taking the grand jury proceedings and broadcasting them to these three agencies."

H. Tr. 1 (11).

He refused to sign the order unless the government provided him with the name of one single agent from each of the three named federal agencies (I.R.S., H.E.W., and F.B.I.) who would be authorized to receive the requested disclosure. H. Tr. I (8-12).

At this point, the government was forced to concede that no F.B.I. agent was involved in the investigation as a part of which appellants' partnership had received the subpoenas sought to be quashed. (H. Tr. I (11)). When pressed for the name of a single I.R.S. agent the government stated that "at [that] time," two Special Agents were involved in the conduct of the investigation (H. Tr. I (11)). In addition, they were admittedly being assisted by one Revenue Agent. The government's choice of words may well have carefully masked the fact that a larger number of I.R.S. agents had previously obtained unauthorized disclosure of grand jury evidence but were no longer working on the particular case.

When it came to the question of disclosure to agents of the Department of Health, Education and Welfare, the government again pressed for greater disclosure than Judge Wyatt was willing to allow. The Assistant stated that:

"I have three people working for me directly under my supervision, and all three of these people work on different investigations. I would request that these three people. . ."

H. Tr. I (13). The court cut off the colloquy and refused, but the impression, buttressed by the facts recited above was again left that these three agents of Health, Education and Welfare had all had unrestricted access to all of the evidence taken before or subpoenaed by the grand jury.

On March 21, 1977 Judge Wyatt held additional argument on appellants' standing to object to the issuance of his modified order. While overruling appellants' objections to the issuance of the Rule 6(e) order and their request for an evidentiary hearing, he did so without prejudice (H. Tr. II (5)) and stayed the Rule 6(e) order pending appeal (H. Tr. II (7-8)).

ARGUMENT

The District Court Abused Its Discretion In Granting A Grand Jury Disclosure Order Without Conducting An Evidentiary Hearing Into The Scope of the Government's Admitted Violation of Rule 6(e)

Rule 6(e) of the Federal Rules of Criminal Procedure

provides in relevant part:

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. (Emphasis supplied.)

The language of the rule is clear and there is no question on this record that it was violated by the government.*

For over nine months, it has been:

- (1) disclosing evidence obtained by grand jury subpoena to persons other than attorneys for the government without ever seeking the court authorization specifically mandated by Rule 6(e);
- (2) disclosing such evidence to agencies outside the United States Department of Justice without ever demonstrating the necessity for such agencies to be involved in the analysis of grand jury evidence;
- (3) disclosing such evidence to agencies with no enforcement authority over the statutes stated in

*While an amendment to Rule 6(e) permitting access to persons other than attorneys for the government under certain conditions has been proposed, its effective date has been postponed until August 1, 1977. Pub. L. 94-349, 90 Stat. 822 (July 8, 1976).

certain subpoenas to be the focus of the grand jury's investigation;

(4) disclosing such evidence to a substantial number of individual agents; and

(5) exercising minimal supervision of the activities of the agents granted access to the materials to assure that their actions preserved the essential secrecy of the grand jury process.

Despite the extraordinary difficulty inherent in a private citizen's establishing a Rule 6(e) violation, appellants in this case have shown a substantial one. There is strong reason to believe that an evidentiary hearing would have demonstrated that the violation was even more serious than that pieced together thus far by appellants and grudgingly conceded by the government. Under these circumstances, Judge Wyatt's issuance of the order appealed from was an abuse of discretion.

(ftn. contd)

The proposed rule would state in relevant part:

(e) Secrecy of Proceedings and Disclosure.

Disclosure of matters occurring before the grand jury other than its deliberation and the vote of any juror may be made to the attorneys for the government for the use and the performance of their duties. For purposes of this subdivision attorneys for the government includes those enumerated in Rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties.

The recent case, J. R. Simplot et al. v. United States District Court, ____ F. 2d ____ (9th Cir. Nov. 12, 1976) (reported in 39 AFTR 2d 77-372) is substantially in point. In that case the defendant appealed from the grant to the government of an ex parte Rule 6(e) disclosure order authorizing disclosure of evidence obtained by the grand jury to 24 named employees of the Internal Revenue Service apparently for both criminal and civil purposes. The Ninth Circuit held first that an appeal would lie from the grant of the order.* Fully mindful of the drawbacks of an interlocutory appeal, the Court nevertheless found that appellants had shown a sufficient danger of an irremediable breach of grand jury secrecy to permit review. The principal factors relied on in Simplot are present here: (a) the grand jury is still in session; (b) no indictment has been returned against appellants; (c) even though the disclosure order signed by Judge Wyatt limits disclosure to criminal investigations, the disclosures made prior to the request for an order were made to persons including Revenue Agents of the I.R.S. who well may have made preparatory civil use of the information. Most significantly, here, unlike Simplot there is an admitted prior breach of secrecy.

After upholding the right to appeal the

*See also, United States v. Doe, 455 F. 2d 753 (1st Cir.), affirmed in part and vacated in part sub nom. Gravel v. United States, 408 U.S. 606 (1972); Cf. In Re Investigation Before April 1975 Grand Jury, 531 F. 2d 600, 605 n. 8 (D.C. Cir. 1976).

Simplot court vacated the disclosure order and remanded the case to the district court for an adversary hearing in which the government would be required to show, on an individual by individual basis, the need for the expert assistance of each I.R.S. agent. It further held that to the extent that disclosure was to be made for civil purposes, the government would be required to show "particularized need" for the disclosure.

The Court made absolutely clear that the right of a person affected by a grand jury disclosure order to contest the issuance of the order was equally applicable to cases in which disclosure was being sought by the government for criminal investigative purposes.

"[A]gency assistance to the prosecutor or the grand jury should never be allowed except upon an adversary hearing resulting in a finding that assistance is necessary. . .

Because the decision to allow disclosure is the result of a balancing process, in appropriate cases the need for allowing agency personnel to assist in the preparation of the presentation to the grand jury will outweigh countervailing values. To meet that standard in a case like Simplot, the Government must show the necessity for each person's aid rather than showing merely a general necessity for assistance, expert or otherwise. Moreover, absent an explanation for the failure to use qualified personnel within the Justice Department, the Government cannot carry its burden of showing that outside experts are necessary."

39 AFTR 2d at 77-376.

Other courts too have continuously concerned themselves with placing limitations on disclosure of grand jury evidence. Even where the requirements of Rule 6(e) are meticulously followed and a disclosure order routinely obtained, courts have demanded a stringent demonstration of the necessity for disclosure and have carefully imposed strict conditions on the circumstances surrounding the disclosure so as to assure that proper supervision by the United States Attorney is maintained. See, Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1125 n. 49, 1126-34 (E.D. Pa. 1976). As another court has stated in granting disclosure:

"If there were no brakes upon the power of the government to set a grand jury upon an investigative course for the sole purpose of obtaining records to submit to a government agency for investigation, then our liberties would indeed be insecure, notwithstanding that the court can review the good faith questions. . . ."

In re William H. Pflaumer & Sons, Inc., 53 F.R.D. 464, 476 (D.C.E.D.Pa. 1971).

A leading commentary similarly has warned:

"To the extent that access is gained to information unobtainable by the use of the agencies' own investigative procedures, the limits on agency power which Congress sought to build into the statutes are circumvented. Congress has chosen not to give the agencies powers comparable to those of the grand jury, but rather has fashioned statutes providing protections for citizens under administrative investigation. That policy is

subverted when the agencies have easy access to kinds of information obtainable only by the grand jury's extraordinary powers.

Aside from congressional policy, restrictions on agency investigations are fundamental to our liberties. The grand jury is properly an arm of the court, not the executive. The agencies are denied unrestrained inquisitorial powers comparable to the grand jury's because that kind of power should not be vested in the executive branch. Expansion of agency power through indirect access to grand jury material permits the executive to wield such power."

Note, Administrative Agency Access to Grand Jury Material,
75 Col. L. Rev. 162, 178-79 (1975).

The critical point is that disclosure of grand jury evidence for purposes of both civil and criminal investigations involves a careful balancing process. It may well be that in most criminal cases the government will be able to sustain its burden of showing the need for disclosure and it will incorporate adequate and visible safeguards against dissemination of excessive information or to an excessive number of persons. The instant case, however, presents far more serious problems, which cannot be shunted aside with a broad brush stroke highlighting the grand jury's need to investigate freely. For even that fundamental doctrine is subject to a limiting principle of lawfulness.

"[The grand jury] must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it."

United States v. Dionisio, 410 U.S. 1, 17-18 (1973) (emphasis supplied).

To deny appellants relief in this case would destroy much of the protection intended to be afforded by Rule 6(e). The effect of Judge Wyatt's order, if allowed to stand, would be that no private citizen could ever effectively challenge an order expiating, retroactively, the grossest violation of that citizen's right to have grand jury proceedings conducted in accordance with the governing law of secrecy. Even if the illegal disclosures in this case have been made to scores of agents under the most uncontrolled and unsupervised circumstances, the government has been freed by the retroactive order from all burden of explanation and justification, all risk of sanction.

In many cases involving allegations of grand jury abuse by the government, complaining individuals are required to wait and demonstrate prejudice after a future trial and conviction. E.g., In The Matter Of The Grand Jury Subpoena Served on John Doe, 546 F. 2d 498 (2d Cir. 1976). But here, the complainants are not protected or in any way aided by having some right to show a future prejudicial effect of the abuse. The injury to appellants occurred at the moment Rule 6(e) was violated since they are precisely within the category of those intended to be protected by the Rule. Their injuries were ignored and governmental lawlessness rewarded by the granting of the retroactive order of Judge Wyatt, especially

without an evidentiary hearing to explore the magnitude of the violation of Rule 6(e). Without relief by this Court at the present time, the rule of grand jury secrecy will have suffered an irremediable breach.

CONCLUSION

The order appealed from must be vacated and the case remanded for an evidentiary hearing.

DATED: New York, New York
April 28, 1977

Respectfully submitted,

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Robert Beck and Jacob
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New York, New York 10016

OF COUNSEL
Stanley S. Arkin
S. Andrew Schaffer

A P P E N D I X

DOCKET ENTRIES

- 3- 2-77 IN RE: GRAND JURY PROCEEDINGS OF MANALIN REALTY CO.--
Filed affdvt & Show cause order to quash GJSDT & to
suppress other evidence obtained by the use of prior
GJS. ret. 3-7-77 Rm. 506 Frankel, J.
- 3- 2-77 IN RE: GRAND JURY PROCEEDINGS OF MANALIN REALTY CO.--
Filed memo in support for quashing GYSdT.
- 3-22-77 IN RE: GRAND JURY PROCEEDINGS ON MANALIN REALTY--
Filed notification of appearing in behalf of defts,
by S. Andrew Schaffer 300 Madison Ave., NYC, Tel.
869-1450.
- 3-22-77 IN RE: GRAND JURY PROCEEDINGS ON MANALIN RLTY,--
Filed affdvt for order to quash two subpoenas
issued to Manalin Rlty. by Robert Beck.
- 3-22-77 IN RE: GRAND JURY PROCEEDINGS ON MANALIN REALTY--Filed
affdvt. of Jacob Freedman for order to quash two
subpoenas issued to Manalin Rlty.
- 3-22-77 IN RE: GRAND JURY PROCEEDINGS ON MANALIN RLTY.--Filed
memo reply in support of order quashing Grand Jury
Subpoenas.
- 3-22-77 IN RE: GRAND JURY PROCEEDINGS ON MANALIN RLTY.--Filed
one brown envelope ordered sealed (one affdvt.
by govt.) AUSA George Wilson.
- 3-22-77 IN RE: GRAND JURY PROCEEDINGS ON MANALIN RLTY.--Filed
memo endorsed on show cause order filed 3-2-77, after
hearing the within to quash the subpoenas motion is
granted, & is otherwise denied. The papers have
been heretofore ordered orally to be sealed that
such order is vacated except that the affdvt. of
Geo. E. Wilson, Esq., sworn to 3-11-77 shall con-
tinue to be kept sealed except to the extent needed
for any appeal as agreed by the parties or as ordered
by this court or court of appeals, so ordered, Wyatt, J.
- 3-22-77 IN RE: TO TESTIMONY BEFORE & DOCUMENTS SUBPOENAED BY
THE 5-76 ADDITIONAL GRAND JURY--Filed order that
the US attorney's office for the SD of NY be granted
leave to special agent Robert Hoffman & Lawrence
Leach IRS & Wallace J. Katz of Health Education &
Welfare, Wyatt, J.
- 3-25-77 IN RE: TESTIMONY BEFORE AND DOCUMENTS SUBPOENAED BY
THE 1976 ADDITIONAL GRAND JURY,--Filed notice of
appeal of Robert Beck & Jacob Freedman from the order
of Judge Wyatt dated 3-11-77 & entered 3-21-77, mailed
copy to US attny.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
IN THE MATTER OF TESTIMONY BEFORE :
AND DOCUMENTS SUBPOENAED BY THE : ORDER
MAY 1976 ADDITIONAL GRAND JURY. :
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This matter comes before the Court on the motion of George E. Wilson, Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, for an Order permitting the United States Attorney's Office to disclose to the Special Agents of the Federal Bureau Investigation and Internal Revenue Service, Revenue Agents of the Internal Revenue Service, and duly authorized personnel from the Department of Health, Education and Welfare all assigned to work under the direct supervision of an Assistant United States Attorney for the Southern District of New York, the transcripts of testimony taken, and the documents subpoenaed before the May 1976 Additional Grand Jury for the Southern District of New York for the period May 25, 1976 through November 24, 1977 in its investigation of Medicaid/Medicare fraud within the jurisdiction of the Southern District of New York.

It is on this 11th day of March, 1977,

ORDERED that the United States Attorney's Office

for the Southern District of New York be granted leave to Special Agent Robert Hoffman and Revenue Agent Lawrence Leach disclose to/~~duly-authorized-persons-from-the-Federal-Bureau~~ of the Wallace Katz of the Investigation, Internal Revenue Service and/Department of Health, Education and Welfare, the documents subpoenaed and transcripts of testimony of the May 1976 Additional Grand Jury for the Southern District of New York in its investigation of Medicaid/Medicare fraud upon the following conditions:

(1) All testimony and documents shall be indexed and kept in a secure place in the Office of the United States Attorney.

(2) There shall be an index kept for each separate investigation by the Assistant United States Attorney in charge of the investigations which shall list the following:

- (a) A list of all testimony before the Grand Jury.
- (b) A list of all documents received by the Grand Jury.
- (c) A list of all agents and other personnel, other than Assistant United States Attorneys, having access to the testimony or documents along with a statement of the reason for such access.

(3) This order shall be applicable only to criminal investigations.

This order shall be nunc pro tunc to May 25, 1976.

United States District Judge

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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IN RE: 1976 ADDITIONAL GRAND JURY
(Manalin Realty)

: M11-188

-----x

B E F O R E:

HON. INZER B. WYATT,
District Judge

New York, New York
March 11, 1977--3:30 p.m.

A P P E A R A N C E S :

ROBERT B. FISKE, JR., ESQ.,
United States Attorney for the
Southern District of New York
BY: GEORGE WILSON, ESQ.,
Assistant United States Attorney

S. ANDREW SCHAFFER, ESQ.,
Attorney for Movant.

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2 (In the robing room)

3 THE COURT: All right now, tell me about this
4 motion.

5 First, Mr. Schaffer, why do we need it in
6 the robing room?

7 MR.WILSON: Your Honor, I made that request.

8 THE COURT: Oh, excuse me.

9 MR. WILSON: The reason I made the request,
10 I am also going to ask that the transcript and the papers
11 be sealed because it does deal with the operation of a
12 sitting grand jury in a very long and complex investigation
13 that has gone for almost a year and is scheduled to go
14 until November and will probably go to a new grand jury,
15 and I think this is not the type of thing that should be a
16 public record.

17 MR. SCHAFER: Your Honor, I might add that
18 ordinarily I would not oppose a request to seal a proceed-
19 ing with respect to a grand jury problem. However, upon
20 a perusal of the papers which Mr. Wilson served me with
21 this morning, I find nothing in his papers and I find nothing
22 in my own papers which reveal matters of testimony or evi-
23 dence before the grand jury, and therefore I see no need
24 to have these proceedings or the papers filed with respect
25 to these proceedings sealed.

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2 THE COURT: Well, I don't know.

3 Is your request to seal all the papers?

4 That comes a little late. The papers have already been
5 made a matter of public record.

6 MR.WILSON: Your Honor, I believe that our
7 papers were delivered direct to the chambers and have not
8 been filed.

9 THE COURT: But the order to show cause is a
10 matter of public record.

11 MR. WILSON: I understand that, your Honor.
12 I have no problem with that. It's just that it deals with
13 a grand jury --

14 THE COURT: You want your affidavit sealed?

15 MR. WILSON: And transcript of the minutes
16 of this hearing, and the reason is that it deals with the
17 operation of a grand jury, and I don't think there is any
18 abiding public interest in the intricate operation of the
19 grand jury and an ongoing investigation. There are factual
20 matters to the extent that we go into some detail in answer-
21 ing Mr. Schaffer's affidavit.

22 THE COURT: Well, it can't do the movants any
23 harm. I will grant that. I will seal the papers.

24 But now let's talk about the motion. The
25 motion says that the production of the papers under the

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2 subpoena is resisted because somebody from the government's
3 side -- I assume Mr. Wilson -- has been making disclosures
4 to an HEW employee.

5 Well, this is not the right punishment for
6 that. If he's done it, so be it, but I am not going to
7 quash the subpoena on that ground.

8 MR. SCHAFFER: I have two grounds, your Honor.

9 THE COURT: Yes, so let's turn to the other
10 ground.

11 The other ground is the Fifth Amendment ground.

12 MR. SCHAFFER: Yes. If it please your Honor,
13 the first part of my motion is addressed to two subpoenas
14 which were served on an entity called Manalin Realty Company.

15 THE COURT: Yes, I know, the partners of
16 which are these two individuals.

17 MR. SCHAFFER: Precisely.

18 THE COURT: Yes?

19 MR. SCHAFFER: And in my memorandum of law,
20 your Honor, I have cited to the Court the case -- does
21 your Honor wish the attorneys to rise during this discussion?

22 THE COURT: I beg your pardon?

23 MR. SCHAFFER: Shall I stand?

24 THE COURT: No, you may sit.

25 MR. SCHAFFER: I believe, your Honor, that

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2 on the law that this case is controlled by the Slutzky case
3 cited in my memorandum of law.

4 Now, in the government's reply which I re-
5 ceived today, the government proceeds to resist that con-
6 clusion with two arguments:

7 The first is that the affidavit which I sub-
8 mitted is insufficient to bring the issue to the Court's
9 attention because the affidavit alleges that Manalin is a
10 partnership and Mr. Wilson seems to argue that I can't make
11 that allegation, that only one of the partners can.

12 THE COURT: That's right.

13 MR. SCHAFFER: I believe, your Honor, that
14 argument is frivolous for two reasons: Number one, the
15 government has the partnership tax return and knows it's a
16 partnership. Secondly, this is --

17 THE COURT: Well, it will result in a few
18 days' delay, but it may take me a few days to look it up,
19 so would you get me an affidavit from these two people
20 telling me about the partnership and also telling me about
21 the connection with Prospect?

22 MR. SCHAFFER: If I may, your Honor, I will
23 proceed one bit further:

24 The government appears to concede it's a
25 partnership because the first of four subpoenas which it

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2 issued is issued to any partner of Manalin Realty Company,
3 and it's issued to a partnership on its face, not the one
4 I am seeking to quash, but the first of the four in the
5 series.

6 THE COURT: I agree with you, it seems tech-
7 nical, but if Mr. Wilson wants to insist on the point, get
8 me an affidavit. I would prefer to have an affidavit from
9 these two people. There is no reason why, if that's the
10 fact, they can't go on record on it.

11 MR. SCHAFFER: Fine, I will produce an affi-
12 davit to that effect.

13 THE COURT: Now, what is their connection
14 with Prospect Hospital? Well, rather, I know that they
15 own the Prospect Hospital, but what is the connection of
16 the partnership, Manalin Realty, and Prospect Hospital?

17 MR. SCHAFFER: Your Honor, with respect to
18 that point, that goes to the second point that Mr. Wilson
19 raised with respect to whether or not these records must be
20 produced under the doctrine which has come to be known as
21 the required records exception, which requires certain
22 organizations to produce their records.

23 Now, your Honor, with respect to that issue,
24 the rules and regulations which Mr. Wilson has cited in
25 his affidavit are rules which are binding on Medicaid or

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2 Medicare providers.

3 Specifically the ones that he cites in his
4 affidavit are rules for Medicare providers.

5 THE COURT: I understand.

6 MR. SCHAFFER: One thing is clear as clear
7 can be. Manalin Realty, the recipient of the subpoena, is
8 not a Medicare or Medicaid provider.

9 THE COURT: Well, is Prospect?

10 MR. SCHAFFER: Prospect Hospital is.

11 Now, under the rules and regulations cited
12 by Mr. Wilson, a Medicare or Medicaid provider must make
13 available certain records. Upon the request of the relevant
14 government authorities it must disclose whether it, the
15 provider, is related to other organizations. But that is
16 not what is being brought on before your Honor by this
17 motion. This is not a subpoena issued to Prospect Hospital.
18 We have complied with that subpoena.

19 THE COURT: What is the connection of Manalin,
20 the partnership, and Prospect Hospital?

21 MR. SCHAFFER: They are located adjacent to
22 one another and they have at least two owners in common.

23 THE COURT: Well, does Manalin rent premises
24 to Prospect? Does it operate Prospect?

25 MR. SCHAFFER: It doesn't operate Prospect, no.

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2 Mr. Wilson has made no such allegation.

3 I don't know all of the facts in the relation-
4 ship --

5 THE COURT: I don't know any reason why these
6 two people shouldn't be able to plead the Fifth Amendment.

7 Why not, Mr. Wilson? Of course, I can't
8 decide it this afternoon.

9 What do I have here? I have the papers of
10 Mr. Schaffer; I have got your affidavit.

11 Now, do I have anything else?

12 MR. WILSON: You have a proposed order, the
13 Rule 6(e) order which I have referred to in my affidavit,
14 and I think your Honor can deal with that at a later time
15 at your leisure. I am not suggesting that it's necessary,
16 but I think it's probably good insurance against further
17 motion of this type.

18 THE COURT: Well, I am not going to authorize
19 you to disclose to everybody in the FBI, everybody in the
20 Internal Revenue Service and everybody in the Department
21 of Health, Education and Welfare.

22 MR. WILSON: No, your Honor, I am not asking
23 for that.

24 THE COURT: It might be the human race.

25 MR. WILSON: No, your Honor, I am not asking
for that.

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2 THE COURT: You say "disclose to duly author-
3 ized persons."

4 MR. WILSON: Yes, your Honor.

5 THE COURT: Duly authorized by whom?

6 MR. WILSON: May I explain that term and
7 maybe it should be made more specific.

8 A duly authorized person is an investigator
9 in one of those agencies which is assigned to investigate
10 a particular case.

11 Now, to explain, this investigation really
12 consists of about twenty-five different investigations into
13 hospitals, clinics, laboratories and other types of activi-
14 ties.

15 On each individual investigation, which is a
16 separate investigation, there is one or more special agents
17 of the Internal Revenue Service, one or two, along with one
18 Revenue agent who does the accounting work, and if there
19 are Title 18 aspects to the investigation, there will also
20 be an FBI agent assigned to the case working in conjunction
21 with IRS and also --

22 THE COURT: Well, who is the person from the
23 FBI? What is his name?

24 MR. WILSON: We have many agents.

25 THE COURT: Well, only one. Only one.

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2 MR. WILSON: What I propose, your Honor --

3 THE COURT: Well, all right, I won't authorize
4 that it be revealed to any of them.

5 Don't give it to anybody. Keep it secret.

6 Now, let's go on now.

7 MR. WILSON: May I be heard on that?

8 THE COURT: No, you may not. I am finished.

9 MR. WILSON: Your ruling will just bring the
10 investigation to a halt.

11 THE COURT: All right, so be it.

12 MR. WILSON: May I be heard?

13 THE COURT: No, you may not. You have been
14 heard.

15 MR. WILSON: Your Honor, you are not giving
16 me a chance to respond to your question.

17 THE COURT: You told me there are twenty-five
18 from each agency, and you are making them, in effect,
19 Assistant United States Attorneys.

20 MR. WILSON: No, your Honor, you misunderstood.
21 I didn't make myself clear.

22 THE COURT: I asked you for the name of one
23 person from the FBI. That I am willing to do. One person
24 from the Internal Revenue Service; one person from the
25 Department of Health, Education and Welfare, but no more.

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2 MR. WILSON: As to this particular case, your
3 Honor?

4 THE COURT: As to the --

MR. WILSON: Manalin Realty?

6 THE COURT: As to this realty company, yes.

7 MR. WILSON: Your Honor, I had attempted in
8 this order to fashion an order which would cover the entire
9 investigation, and the way I suggest that it be done is
10 that there would be --

11 THE COURT: Apparently you are taking the
12 grand jury proceedings and broadcasting them to these three
13 agencies.

14 MR. WILSON: No, your Honor, we are not. We
15 are not. Only the agents who are directly assigned to a
16 particular investigation have access to the material. But
17 my point is that in addition to Manalin Realty there are
18 about twenty other separate unrelated investigations with
19 different agents assigned to each one. It is on a need
20 to know basis. In the Manalin Realty case it just so
21 happens there are no FBI agents. There may be in the
22 future. There is one Revenue agent and two special agents
23 at this time.

24 THE COURT: All I am concerned about is
25 the matter that is before me, and if it relates to this

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2 partnership, this realty company.

3 MR. WILSON: Yes, your Honor.

4 THE COURT: Now, who is it that you want to
5 be able to reveal the information to?

6 MR. WILSON: As to the Manalin Realty case,
7 Special Agent Robert Hoffmann, a special agent of the IRS;
8 a Revenue agent --

9 THE COURT: Wait, wait.

10 Now, he is what, FBI?

11 MR. WILSON: Special agent of the IRS.

12 THE COURT: What's his name?

13 MR. WILSON: Robert Hoffmann.

14 THE COURT: And who else?

15 MR. WILSON: There is a Revenue agent from
16 IRS; his name is Lawrence Leach --

17 THE COURT: I thought Robert Hoffmann was the
18 Revenue agent?

19 MR. WILSON: He is a special agent. He is
20 the criminal investigator. The Revenue agent is the
21 accountant who backs up the special agent.

22 THE COURT: Special Agent Robert Hoffmann?

23 MR. WILSON: Yes, your Honor.

24 THE COURT: Of the Internal Revenue Service?

25 MR. WILSON: Yes, your Honor.

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2 THE COURT: Now who else?

3 MR. WILSON: Revenue Agent Lawrence Leach.

4 THE COURT: And what about the Department of
5 Health, Education and Welfare?

6 MR. WILSON: I have three people working for
7 me directly under my supervision, and all three of these
8 people work on different investigations. I would request
9 that these three people --

10 THE COURT: No. One.

11 MR. WILSON: All right, Mr. Wallace J. Katz.

12 THE COURT: And anybody from the FBI?

13 MR. WILSON: Not at the present, your Honor.

14 THE COURT: All right, I have said:

15 "Ordered that the United States Attorney's
16 office for the Southern District of New York be granted
17 leave to disclose to Special Agent Robert Hoffmann of
18 Internal Revenue Service and Wallace J. Katz of the Depart-
19 ment of Health, Education and Welfare the documents sub-
20 poenaed," and so forth and so on and so on.

21 And, Madam Clerk, will you see that this order--
22 Mr. Schaffer, if you and Mr. Wilson want to conform your
23 copies, you may -- is filed and sealed appropriately.

24 MR. SCHAFFER: Your Honor --

25 THE COURT: Now, Mr. Wilson, do you have any

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2 memorandum of law or is it all in here?

3 MR. WILSON: It is in my affidavit, your
4 Honor.

5 THE COURT: All right.

6 MR. WILSON: Now, you had asked me about what
7 our position is as to the connection between Manalin Realty
8 and Prospect Hospital.

9 This, I think, illustrates the necessity of
10 an affidavit. These are matters which either Dr. Freedman
11 or Mr. Beck could advise the Court and Mr. Schaffer and
12 myself on, but it is our information that this so-called
13 partnership -- we are not sure who all the partners are --
14 is owned and controlled by the very same people who own and
15 control Prospect Hospital. And, as you might recall from
16 another case, your Honor, this is what is called a related
17 organization, and Prospect Hospital is certified to do
18 Medicare and Medicaid work, and as your Honor will also re-
19 call, they have to file on an annual basis a cost report
20 which sets forth their expense of operation, patient care.

21 The regulations, both in the Code of Federal
22 Regulations and the Administrative Regulations require that
23 only the actual cost of work done or services furnished
24 by a related organization be claimed on a cost report, not
25 the contract price, which would include cost plus profit.

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2 Now, it has been alleged, and we will assume
3 for the purposes of argument that Manalin Realty owns sub-
4 stantial real estate and building in the vicinity of Prospect
5 Hospital and is, indeed, furnishing some of its facilities
6 either for money or for services, or the equivalent of
7 services to Prospect Hospital. So there is a relationship
8 between the two.

9 Now, under the regulations, and specifically
10 I have copied for your Honor under 20CFR Section 405.406,
11 and I will hand your Honor a copy of that regulation, and
12 I also have a copy for Mr. Schaffer. There is a requirement
13 as part of the record keeping requirements specifically,
14 and I invite the Court's attention to Sub-Section (d),
15 which is entitled --

16 THE COURT: I haven't got time to go into
17 that. We will have to do this next week.

18 MR. WILSON: It just says, in effect, your
19 Honor, that the records, or at least our interpretation of
20 the records, at least our interpretation of it, that the
21 records of a related organization must be available to the
22 auditors of the intermediary, the representative of the
23 government, when it is checking to make sure the cost re-
24 ports are accurate.

25 Now, it is our position that because this is

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2 a related organization that its records are also, as much as
3 Prospect Hospital, subject to audit, subject to verification,
4 and therefore under the Shapiro case they are public records
5 or required records, and therefore the personal privilege
6 does not apply.

7 THE COURT: Mr. Schaffer, can you get an
8 affidavit from your clients covering the matters contained
9 in your affidavit?

10 MR. SCHAFFER: Yes.

11 THE COURT: By Monday?

12 MR. SCHAFFER: I will prepare it Monday and
13 I will have it in court no later than Tuesday morning, your
14 Honor.

15 Now, may I just differentiate, your Honor,
16 with respect to two portions of what we discussed?

17 THE COURT: No, because I can't do it any
18 more today, because I have got other matters to attend to
19 and I have got to leave.

20 Let's then adjourn this to Tuesday morning
21 and I will try to do some work on it meanwhile, and by
22 Tuesday morning be prepared to backup your affidavit --

23 MR. SCHAFFER: I shall.

24 THE COURT: -- by two affidavits of the two
25 partners.

MR. SCHAFFER: I shall, your Honor.

THE COURT: So that Mr. Wilson doesn't have this point that he has made that you are a lawyer -- well, just backup your affidavit with your clients.

MR. SCHAFFER: I will, your Honor.

THE COURT: And then I will give you a chance to tell me more about it, but I can't do it now.

MR. SCHAFFER: I understand.

MR. WILSON: What time will that be?

THE COURT: 10:30. It will be on the calendar.

MR. SCHAFFER: Your Honor, may I respectfully request that the sealed order, the effect of the sealed order be stayed until then, because I know your Honor is terribly pressed, and I wanted an opportunity to make some response to Mr. Wilson's presentation with respect to --

THE COURT: I don't think you have any interested in the matter. You have no interest in the matter. This is just a matter between the Court and the grand jury which is sitting in this court and the United States Attorney. I don't see that you have any interest in it at all.

MR. SCHAFFER: Ten seconds, your Honor?

THE COURT: Yes.

MR. SCHAFFER: I did mail to your Honor's chambers a copy of the Simplot case which is a decision of

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2 Ninth Circuit in November where Judge Hofsteder took the
3 contrary view. She said that ex parte orders under Rule 6(e)
4 are litigatable or should be litigated adversary proceedings
5 in which the person who will be affected by the disclosure,
6 or may be affected by the disclosure is entitled to an
7 adversary hearing in the District Court on the particular-
8 ized need which the U.S. Attorney must make to get a Rule
9 6(e) order.

10 MR. WILSON: That was a civil -- that Rule
11 6(e) order had to do with a civil --

12 MR. SCHAFFER: And I respectfully direct your
13 Honor's attention to that case rather than take more of
14 the Court's time now.

15 THE COURT: Wait. I haven't ever seen that
16 case.

17 Where is your letter?

18 THE LAW CLERK: There is a copy in your file,
19 Judge.

20 MR. SCHAFFER: I am across that case last
21 weekend after I filed my papers and put it in the mail for
22 your Honor on Tuesday.

23 MR. WILSON: This dealt with a civil inquiry,
24 your Honor. We are not making any inquiry into a civil
25 tax liability in our grand jury. This is strictly a

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2 criminal matter.

3 THE COURT: I am sorry, Mr. Schaffer, I do
4 have it.

5 You sent us this?

6 MR. SCHAFFER: Yes.

7 THE COURT: This appeal raises important
8 issues about the civil use of grand jury material.

9 We don't --

10 MR. SCHAFFER: It goes on in the text, your
11 Honor, most respectfully, it goes on to say that the scope
12 of the authorization in terms of the number of personnel
13 and the types of personnel and the procedures under which
14 they will be subject, that plus the case cited in my brief
15 in the Eastern District of Pennsylvania make it clear that
16 there is standing for someone in my position as an attorney,
17 at least under those cases, your Honor, to raise these issues.

18 THE COURT: It's hard for me to believe it,
19 but I will hear you on Tuesday. Meanwhile I ^{will} ~~won't~~ stay it.

20 MR. SCHAFFER: I am grateful.

21 MR. WILSON: Your Honor, you left out Mr. Leach's
22 name on this modification of the order. May I request we
23 call Mr. Leach, who is a Revenue agent who works for
24 Mr. Hoffmann. One is an investigator and the other is an
25 accountant of the IRS.

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THE COURT: Why do we need both?

MR. WILSON: Because they work together as a team in these investigations. In any particular investigation a Revenue agent is assigned --

THE COURT: What is his name?

MR. WILSON: Lawrence Leach.

THE COURT: All right.

MR. WILSON: Thank you, your Honor.

(Adjourned to March 14, 1977 at 10:30 a.m.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of
:
GRAND JURY PROCEEDING
MANALIN REALTY CO. :
-----x

B E F O R E:

HON. INZER B. WYATT,
District Judge

New York, New York
March 21, 1977--

A P P E A R A N C E S:

STANLEY S. ARKIN, ESQ.,
Attorney for Manalin Realty Co.
BY: ANDREW SCHAFER, ESQ., of Counsel

ROBERT B. FISKE, JR., ESQ.,
United States Attorney for the
Southern District of New York
BY: GEORGE E. WILSON, ESQ.,
Assistant United States Attorney

(In the robing room)

THE COURT: This is the continuation of a hearing which we began in the robing room on March 11, and with the agreement of both sides this is not being held in open court but in the robing room.

We did not resolve these problems at the last hearing because we did not have enough time. I had authorized Mr. Wilson to make available, I guess this is under Rule 6(e), certain grand jury matters to two agents of the Internal Revenue Service and one agent of the Department of Health, Education and Welfare. And then, Mr. Schaffer, I believe you wanted to make some further points or cite me another case or did you give me this Simplot case?

Do you want to say anything else now that is not based on the Simplot case?

MR. SCHAFFER: No, your Honor. I would take a moment to emphasize that portion of the Simplot case that I would like to rely on.

Admittedly Simplot dealt with an instance that materials gained during a grand jury investigation were sought to be disclosed in conjunction with a civil tax matter. There is at page 376 of the version of the case which I provided to the Court which contains language to the effect that -- actually I imagine it would be easier

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2 if I quote directly from the top of page 376, the first
3 new paragraph.

4 "Two main points stand out. First, agency
5 assistants to the prosecutor or grand jury should never be
6 allowed; two, except upon an adversay hearing resulting
7 in a finding that assistance is necessary."

8 Admittedly, that is a dictum within the
9 context of this case. Further, because the decision to
10 allow disclosure as a result of a balancing process in
11 appropriate cases in allowing agency personnel to assist in
12 the presentation to the grand jury will outweigh the grand
13 jury's value. The government must show the necessity of
14 aid, for each person's aid, rather than showing the neces-
15 sity for assistance, expertise or otherwise. Moreover,
16 absent the explanation to use personnel within the Justice
17 Department, the government cannot carry its burden in show-
18 ing that outside experts are necessary.

19 I would urge upon this Court that the language
20 from Simplot is applicable even in a criminal context. In
21 the present investigation we have had disclosure from agents
22 other than agents from the Justice Department. Congress
23 has passed legislation delaying the effective date of an
24 amendment to Rule 6(e) which would have allowed, without
25 further inquiry, disclosure from other attorneys for the

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2 government but that is not the law at the present time.

3 I would respectfully urge upon this Court that
4 on the basis of the limited information available to me,
5 I have put into my affidavit with respect to my belief
6 about an abuse of the grand jury process in this investiga-
7 tion. If an adversary hearing were conducted and I cross-
8 examined some of the materials, I submit I would be able
9 to demonstrate that the number of people to whom disclosures
10 have been made and the precautions around that disclosure
11 would be abusive of that.

12 While I realize I am asking this Court for
13 an extraordinary remedy, I think before that remedy is
14 denied, it might be appropriate to have an evidentiary
15 hearing with respect to the degree of unauthorized dis-
16 closure which has taken place last May.

17 Indeed, in the draft order submitted to your
18 Honor, it asked before the Court amended the order to have
19 wholesale disclosure to virtually any agent of the FBI,
20 IRS and so forth. Your Honor's decision was that that, in
21 effect, makes them all Assistant United States Attorneys.
22 I fear, your Honor, that since last May an extraordinary
23 number of desperate people have been given information in
24 the grand jury and that has been done abusively. Immediate
25 action is required.

THE COURT: I do not believe that the principles of Simplot apply here. In Simplot admittedly there had been a civil tax liability investigation anti-dating the presentation of the matter to a grand jury. Understandably the Simplot Court was concerned with the abuse of the grand jury proceedings by making available to the Internal Revenue Service for use in the criminal tax investigation the materials obtained from the grand jury.

Here, as I understand it, there has not been any civil tax liability investigation of this partnership, Manalin Realty, and accordingly I think I will adhere to my determination that I will permit what I have limited in the disclosure sought by Mr. Wilson. But if it should hereafter develop in respect of materials already disclosed as to which you move to suppress and which I deny, if it hereafter develops that indictments are returned which include these present movants, my ruling is without prejudice to your ability and right to raise the point either by a motion to suppress or in any other procedural fashion.

In other words, I am not making the determination which forecloses that in the future. All I am saying is that I don't think that under the principles of Simplot I am required to deny this application of Mr. Wilson.

I will add, just among us lawyers, that I find

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2 Simplot rather hard to understand. It is not an easy
3 opinion to digest. It may be that I do not understand it
4 and that is why it has failed to impress me as you think
5 it should.

6 We will go to the other matter.

7 MR. SCHAFFER: Your Honor, may I complete the
8 record with respect to this?

9 THE COURT: Certainly.

10 MR. SCHAFFER: I most respectfully except
11 your Honor's ruling. I would request that the Court stay
12 the order which it has signed for an additional five days.
13 The reason I ask for that, your Honor, is under Simplot
14 the other aspect of the holding, the granting of the 6(c)
15 order, that is appealable. I am still and have not yet
16 decided at this moment to seek an appeal from your Honor's
17 present ruling.

18 If I wait, I have no appellate rights until
19 after a conviction, if any has been obtained. Whereas,
20 under Simplot the Court seems to have permitted an exception
21 to the ordinary rule of non-piecemeal litigation with
22 respect to certain pre-trial rulings.

23 The Ninth Circuit allowed the granting of that
24 order to be appealed. I would respectfully ask this Court
25 for not even the full ten days because I will decide by this

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2 Friday, your Honor, and if we can have a stay pending appeal
3 should an appeal eventuate. I will make that decision by
4 Friday.

5 THE COURT: Mr. Wilson, I must say that I
6 think I would be inclined to grant that.

7 MR. WILSON: Your Honor, I would like to be
8 heard for a moment.

9 I am not sure if Mr. Schaffer is suggesting
10 first if whenever a 6(c) order is obtained relating to a
11 purely criminal investigation, if he is saying that the
12 attorneys for the government should give notice to the
13 attorneys for all the targets and have an adversary hearing.
14 I wonder if the Court would inquire if that is what
15 Mr. Schaffer's contention is.

16 THE COURT: I do not need to inquire about
17 that.

18 MR. WILSON: I do not think he is saying that,
19 but if he is not saying that --

20 THE COURT: He is saying that he wants a few
21 days to decide whether he is going to appeal and during the
22 few days he does not want the situation changed by your
23 going here under the order and making disclosure. Simplot
24 does uphold the appealability.

25 MR. WILSON: Yes, but it dealt with a 6(c)

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2 order which authorized civil tax investigation. I made it
3 clear in the papers that this is a criminal investigation.

4 THE COURT: Mr. Schaffer, you can have the
5 stay. So that the order which is dated March 11 and which
6 has not yet been filed or docketed and which was ordered
7 sealed is stayed until the close of business on Friday,
8 March 25, 1977, within which the movant will determine
9 whether to take an appeal to the Court of Appeals.

10 MR. SCHAFFER: Do I understand your Honor's
11 ruling also that if the notice of appeal is filed, the
12 ~~notice~~ will remain closed pending the outcome of appeal?

13 THE COURT: Yes. I think I will do that too.

14 Now, on the other question, and that is whether
15 these subpoenas may be resisted on the grounds that the
16 respondents subpoenaed have a privilege against self-in-
17 crimination, I'm very much more troubled because this is
18 a partnership.

19 It is not the operator of a nursing home and,
20 therefore, these partners are not required to keep records
21 in any particular order. They are not required to make them
22 available or to make reports and so forth. At our last
23 session Mr. Wilson handed me some of the Social Security
24 Regulations, and particularly 20CFR Section 405.406D.

25 I will give Mr. Wilson now a chance to tell

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2 me what his theory is as to why that is relevant.

3 MR. WILSON: The investigation has established
4 that Manalin does have financial connections with Prospect
5 Hospital. The regulation, in effect, says that a related
6 organization, and we are not talking about different entities,
7 but the same group of people who control the provider and
8 its related organization as the very definition of the re-
9 lated organization, common ownership.

10 We have evidence that Mr. Beck and Mr. Freedman
11 own Prospect Hospital and also own Manalin Realty. We have
12 additional evidence that the third person not mentioned in
13 the affidavits who is a partner, Mr. Albert Levy, who does
14 not appear to be a relative of Beck or Freedman, and he has
15 an interest in the partnership and the hospital.

16 So the Manalin Realty partnership and Prospect
17 Hospital have identical owners.

18 THE COURT: So what? I am addressing myself
19 to the point that under the law and the regulations, if a
20 person is in a particular business, namely, nursing home,
21 and it is getting Medicare or Medicaid payments, he is a
22 provider under the regulations and has certain record keep-
23 ing requirements.

24 Now, where are the record keeping requirements
25 which you say are imposed on Manalin?

MR. WILSON: In 406D2, "Providers shall permit the intermediary," and we are referring now to an auditor, "to examine such records and documents as are necessary to ascertain the information pertinent to the information of the proper amount of programs due."

We interpret that to mean that the intermediary has a right to audit the books of the provider and shall also have a right to go into the transactions of a related organization owned by the same ownership control to the extent that those payments can be determined to be accurate.

The cost to or money paid to a related organization can only be actual costs of goods or services. The intermediary has no way of determining other than what the provider puts on his cost record whether the figures are accurate. The intermediary has the right to go beyond the books of the provider to the books of the related organization to determine whether or not the costs are indeed actual or padded.

In this situation you have three people within this period of time from '72 to '75 owing two different entities. We content that under the facts here that Manalin Realty is just another separate institutional activity which is designed to carry on part of the related operations of

Messrs. Beck, Freedman and Levy.

In this case we found that Manalin Realty runs a medical testing laboratory and a radiology plant hiring a radiologist at a salary. We have also learned that some of the employees are Prospect Hospital --

THE COURT: Let's not go on as to what bad people they are.

MR. WILSON: No, but employees on the payroll of Prospect Hospital whose wages are on Prospect Hospital cost records are being employed on a full and part-time basis for Manalin Realty. Bookkeepers, maintenance personnel and Prospect Hospital is taking space in one of Manalin's buildings. We have established a relationship.

Regardless of whether or not Manalin Realty bills Prospect Hospital, the intermediary has the right to examine the cost which may have been spent on Manalin Realty. The relationship is so close and intertwined that Manalin Realty in this particular case falls within that record keeping requirement.

THE COURT: Well, there is nothing in the regulations that give any right for the intermediary to examine any records except those of the provider.

MR. WILSON: What we are doing is construing the provider to organizations related to the provider.

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When the relationship is so intertwined, it should be considered the provider.

THE COURT: I find no basis for any such construction. Manalin Realty is not a corporation. It is a partnership. It is not a provider. It is not required to keep records and is not required to make those records available under any law or regulation of the Social Security Administration that I have been able to find.

I see no basis for my denying these movants the protection of the privilege against self-incrimination. I feel obliged to grant the motion and quash the subpoenas directed to Manalin Realty.

MR.WILSON: One other point that I would like to make and that is that contrary to the allegations made by Beck and Freedman, Manalin Realty, during this period, was not solely a family partnership and, thus, liable under the Sletsky case. We have an outside person not previously identified who had a small interest in that partnership.

THE COURT: I do not think it is so much a family partnership business. The Sletsky case involved a corporation case, did it not?

MR. WILSON: A family partnership. As you know, the Bellis case at 417 US85 held that the records of a dissolved law partnership were subject to subpoena

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and could not be made a basis of one of the former partners and whether or not there is an organized institutional identity or separate activity other than purely personal business relations.

Obviously the running of a radiology clinic and medical testing laboratory and the renting of buildings is far removed from the intra-family relationship between Beck and Freedman as being brothers-in-law, especially when they have an outsider also as a partner.

MR. SCHAFFER: Mr. Levy is not presently a partner of Manalin.

MR. WILSON: This subpoena does not cover the present time, but '73-'74 and '75. The tax returns show Mr. Levy being a partner.

MR. SCHAFFER: The privilege being asserted is today and not then.

MR. WILSON: I do not think today's privilege protects records which existed three years ago.

THE COURT: Am I not correct that Sletsky upheld the privilege?

MR. SCHAFFER: Yes, your Honor.

MR. WILSON: Because in that case you have people, all blood relations, operating, albeit a large organization, but a family business. Here we have a realty

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2 company.

3 THE COURT: I cannot distinguish on that
4 basis between the two cases, but in Severino, as I remember
5 it, I denied the privilege to a corporation following a
6 state Court of Appeals case. In that case the corporation
7 was, although it was a corporation, it was a family corpora-
8 tion. It was engaged in a business unlike Manalin Realty
9 which was required under those Social Security Regulations
10 under the law to keep certain records.

11 MR. WILSON: That was the partnership.

12 THE COURT: That is not the case which is
13 before me here.

14 MR. WILSON: Sprainberg was a partnership and
15 a family partnership but for the required records rule of
16 Shapiro would have had immunity. They did not have the
17 privilege, as your Honor recalls, because they were required
18 by state laws to keep records in order to be certified as
19 a nursing home.

20 We claim here that Manalin Realty, the opera-
21 tion, is so diverse and is so closely connected with
22 Prospect Hospital that it does not have that distinguishing
23 feature as being a solely family partnership. I think that
24 this is emphasized by the fact that during the years in
25 which we are interested in there is a third partner, an

outsider, whose claim is, at least on the return, being the owner of that business.

THE COURT: All right.

Do we continue to want these papers sealed?

MR. WILSON: Yes, your Honor.

THE COURT: What happens, Mr. Schaffer, when you take an appeal?

MR. SCHAFFER: That was precisely my next question, your Honor.

THE COURT: You will have to get a lawyer for that.

MR. SCHAFFER: Your Honor, now that we have concluded, I was going to ask that we unseal the papers because nothing has transpired during the course of our two hearings which would appear to impair any function any function of the grand jury and in order to permit an appeal, if one is taken, I would respectfully request that the papers filed and the proceedings had in this matter be unsealed.

THE COURT: Mr. Wilson.

MR. WILSON: I think they should remain sealed except as required by Mr. Schaffer for his appeal.

I do not think there is any abiding public interest essentially in regard to the government's affidavit where we explain details of the grand jury. The public does

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2 not need to know what happens in the grand jury, especially
3 since we are in the process of 20 or 25 investigations.
4 We go into detail describing our work.

5 MR. SCHAFFER: I make the request that every-
6 thing except Mr. Wilson's affidavit be unsealed.

7 THE COURT: Does that meet your point?

8 MR. WILSON: If it is anything needed for the
9 appeal. I suppose necessarily that is what it has to be.
10 Of course, Mr. Schaffer has to have access to it for purposes
11 of appeal.

12 THE COURT: But what I am saying is if we
13 continue to keep your affidavit sealed, does that meet your
14 point?

15 MR. WILSON: I think so, your Honor.

16 THE COURT: All right.

17 MR. WILSON: Your Honor, I suppose if we answer
18 the appeal we have to refer to the affidavit.

19 THE COURT: Let's cross that bridge when we
20 come to it and then maybe they can debate about it upstairs.

21 MR. WILSON: Can we agree now on mutual con-
22 sent that anything that is sealed can be unsealed, anything
23 needed for the appeal?

24 MR. SCHAFFER: Of course, your Honor, with
25 respect to unsealing any portion of the affidavit required

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2 for the appeal, I would consent.

3 THE COURT: Was my order sealing the papers
4 just a direction in court on the record?

5 MR. WILSON: I believe it was, your Honor.

6 THE COURT: What form of words have you
7 agreed on, that Mr. Wilson's affidavit shall continue to be
8 kept sealed?

9 MR. WILSON: Unless commented to by the
10 parties for the purposes of the appeal.

11 MR. SCHAFFER: And shall be kept sealed except
12 insofar as --

13 MR. WILSON: Except to the extent needed for
14 the appeal.

15 MR. SCHAFFER: As mutually agreed upon.

16 MR. WILSON: By the parties.

17 THE COURT: After hearing the within motion,
18 it is granted. The papers have been heretofore ordered
19 orally to be sealed. Such order is vacated except that
20 the affidavit of George E. Wilson as sworn to March 11, 1977,
21 shall continue to be kept sealed except to the extent needed
22 for any appeal as agreed by the parties or as ordered by
23 this Court or the Court of Appeals.

24 MR. WILSON: That is acceptable, your Honor.

25 MR. SCHAFFER: Yes, your Honor.

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THE COURT: All right.

MR. WILSON: Thank you, your Honor.

THE COURT: That is all.

* * * *

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ROBERT B. FISKE JR.
APR 27 1977
U. S. ATTORNEY
SO. DIST. OF N. Y.

